Supreme Court, U.S.
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No. 99-1475

In The Supreme Court of the United States

PAMELA STONIER, *et al.*,
Petitioners,

v.

DIGITAL EQUIPMENT CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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76 pp

QUESTIONS PRESENTED

1. Did the U.S. Circuit Court and U.S. District Court err under Fed.R.Civ.P. 56 when they considered evidence against the non-movant that conflicted with evidence they relied on, and overlooked non-movant's allegation of fraud on the record, in an adverse employment action concerning employer prevarication, and thereby granted and affirmed summary judgment for the movant?

2. Did the U.S. Circuit Court and U.S. District Court err under Fed.R.Civ.P. 56 by usurping the role of the jury when they engaged in presumptive, aggressive review of non-movants' evidence, overlooked and misconstrued portions of such evidence, and assessed its persuasive force and drew inferences against the non-movants concerning intent, motive, and credibility regarding contract issues and trade secret violation, and thereby granted and affirmed summary judgment on the basis of insufficiency of evidence and on rulings made as a matter of law?

3. In Rule 56 proceedings, does the Right to Trial Clause of the Seventh Amendment any longer protect the fundamental right and vital democratic institution of trial by jury from judicial usurpation in civil matters where the U.S. Circuit Court and U.S. District Court engage in presumptive, aggressive review of facts and evidence, assessing their persuasive force, drawing inferences against the non-movants, and substituting the court's judgment for that of the jury?

LIST OF PARTIES

The petitioners in this matter include Pamela Stonier, Thinkworks, Inc., and Omnimensions, Inc.

The respondent in this matter is Digital Equipment Corporation.

Rule 29.6 Disclosure

Omnimensions, Inc., a private corporation owned 100% by Pamela Stonier, owns 100% of the stock of Thinkworks, Inc. [1]

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[1] Omnimensions, Inc. acquired the stock of Thinkworks, Inc. in 1998, six years after the effective contractual periods ended between Omnimensions, Inc. and Digital, and between Thinkworks, Inc. and Digital. Ms. Stonier acquired 100% ownership of Omnimensions, Inc. stock on February 12, 2000.

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IN THE

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PAMELA STONIER, et al., *Petitioners,*

v.

DIGITAL EQUIPMENT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

On September 28, 1999 the United States Court of Appeals for the Second Circuit issued a Summary Order affirming in part, vacating and remanding in part the judgment of the District Court granting Respondent's motion for summary judgment. The unpublished summary order is included in the Appendix at A1-A7.

The United States District Court for the District of Vermont issued an Order and entered Judgment granting Respondent's motion for summary judgment on November 17, 1998, adopting the Magistrate Judge's Report and Recommendations which Order, Judgment and Report are included in the Appendix at A8-9, A10 and A11-A34 respectively.

The 2nd Circuit denied Petitioner's petition for panel rehearing and a petition for rehearing *en banc* in an order entered December 10, 1999, which is included in the Appendix at A35-A36.

JURISDICTION

This Court has jurisdiction to review the order of the United States Court of Appeals for the Second Circuit entered on September 28, 1999, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 56 provides, in pertinent part:

(c) Motion and Proceedings Thereon.

> ... The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ...

(e) Form of Affidavits; Further Testimony; Defense Required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

Petitioners brought a civil action against Respondent Digital Equipment Corporation in the United States District Court for the District of Vermont. Petitioner Pamela Stonier brought a cause of action for wrongful discharge on the basis of fraud. Petitioners

Thinkworks, Inc. and Omnimensions, Inc. brought causes of action for breach of contract, business torts, and trade secret violation. The District Court found insufficient evidence to submit disputed issues to a jury, ruled as a matter of law on certain of those issues, and granted Digital's motion for summary judgment in its entirety. The United States Court of Appeals for the Second Circuit affirmed and vacated and remanded in part. Petitioners respectfully petition this Court for a writ of certiorari to review the portion of the judgment that affirmed.

A. Statement and Facts of Petitioner Stonier.

Petitioner Stonier claims she was involuntarily discharged from Respondent effective February 21, 1992 under fraudulent circumstances involving employer prevarication, and should therefore be allowed to circumvent the Transition Financial Services Agreement's ("TSFA") preclusive effect on her suit and take her claim of wrongful discharge to a jury. [1, 2]

In April 1986 Digital recruited Ms. Stonier, a Vice President at an investment bank, to work for Bruce Platt in New York City as a sales support consultant to help Digital sell its goods and services to the financial services industry.[3] In September 1989, Mr. Platt assigned Ms. Stonier to work with Ron Smart, a senior research engineer responsible for knowledge systems research, to develop her innovative ideas that

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[1] 2nd Cir. CA Joint Appendix (hereafter "J.A.") J.A. at 79-81, *Involuntary Reduction in Force – Employee Notice.*

[2] J.A. at 96-100, TFSA.

[3] J.A. at 457-458 at Bruce Platt March 24, 1997 deposition (hereafter "Platt dep.") at 52:4-14, 53:9-54:1.

could assist Mr. Smart in executing his responsibility for leading Digital into the emerging field of knowledge processing using what we today call "IntraNets," "ExtraNets", and Internet and Worldwide Web technologies. [4] In January 1991, Mr. Platt assigned Ms. Stonier to Florida to resume her position in sales support.[5] In April, 1991 Mr. Smart requested Ms. Stonier invite Digital's New Venture's business development manager, Paul McManus, to observe a workshop at First Union National Bank in Miami, Florida, where Ms. Stonier was testing the new technology for Mr. Smart. The test went well and Mr. McManus advised Mr. Smart and Ms. Stonier that he would consider funding development of this new technology if Ms. Stonier would complete a business plan for developing, marketing and selling it.[6] However, Mr. Platt instructed Ms. Stonier to cease working on its development and sell Digital's pre-existing technology. Mr. Smart and Mr. Wysocan wanted her to finish her development work: Mr. Smart, because he was in the midst of developing a knowledge processing machine that needed products like Ms. Stonier's;[7] and Mr. Wysocan, because he was interested in marketing the new technology to banks.[8]

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[4] (Note: e.g. like today's Westlaw and Web pages available on local computer networks – "IntraNets", and global networks – "ExtraNets").

[5] J.A. at 381-407, (Stonier [a/k/a/ Cowdrey] Status Report in behalf of Digital's South Florida Financial Services Business Team dated March/April 1991.

[6] J.A. at 417 McManus March 21, 1997 deposition (hereafter "McManus dep.") at 24:3-10; 32:21-33:23.

[7] J.A. at 420 McManus dep. at 34:1-35:2.

[8] J.A. at 420 McManus dep. at 35:3-37:13.

These are the circumstances that were going on when Mr. Smart and Mr. Wysocan began acting in bad faith, telling Ms. Stonier a stream of lies, in Mr. Smart's case between May 1991 and February 21, 1992, and in Mr. Wysocan's case throughout their contractual dealings following Ms. Stonier's layoff, which until discovery in this civil action were not known to her to have been lies. Mr. Smart's lies form the basis of Ms. Stonier's claims of fraud in the inducement concerning decisions she made to transfer her career into the hands of Ron Smart, who ultimately laid her off, and by his prevarication induced her to sign the TFSA severance agreement which terminated what had been her successful six-year employment with Digital.

In May 1991, Mr. Wysocan and Mr. Smart advised Ms. Stonier that Mr. Platt was going to lay her off effective July 1, 1991, and that to protect her employment she should transfer to Mr. Smart. Ms. Stonier was 47 years of age at that time, and the sole support for her teenaged sons and terminally ill mother. She had no wish to leave Digital.[9] Believing Mr. Smart and Mr. Wysocan, Ms. Stonier transferred to Mr. Smart's control to develop her business plan for the knowledge systems business.[10, 11, 12] However, the record shows that Mr. Smart had no funds properly in place from which to pay Ms. Stonier when he

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[9] J.A. at 572 ¶ 9, Stonier Affidavit.

[10] J.A. at Platt dep. at 463 at 76:3-10 (shows Mr. Smart transferred Ms. Stonier to his cost center effective July 1, 1991).

[11] J.A. at 449 at ¶ A., Smart November 21, 1991 memo.

[12] J.A. at Platt dep. at 461-462 at 65:7-66:7.

transferred her to his organization June 3, 1991.[13, 14] Mr. Smart discharged Ms. Stonier within a few months of having transferred her out of her position with Mr. Platt - a couple of weeks after he extracted the valuable completed business plan from her that was relevant both to his work and to Digital's future business directions.[15] Petitioner Stonier maintains that if a jury of reasonable minds were given the opportunity to assess evidence and testimony fully developed for trial regarding the circumstances surrounding Ms. Stonier's discharge by Ron Smart, there is a strong likelihood that they would infer from conflicting facts that Mr. Smart was not truthful to Ms. Stonier and his management, and planned to keep her around only until she provided him with her detailed plan for launching his technology into a lucrative business, for which he would take the credit and financial gain.[16]

Ms. Stonier supports with prima facie evidence the following allegations that four egregious lies were told to her by Mr. Smart, which resulted in her being discharged and induced to sign the TFSA intended to insulate Digital from any liability in connection with her discharge:[17]

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[13] J.A. at Platt dep. at 461 at 67:12-24, and 463 at 76:3-10.

[14] J.A. at 449 ¶ 5 (Smart November 21, 1991 memo).

[15] J.A. at 450 ¶¶ 8, 9 (Mr. Smart's November 21, 1991 recommendation that Ms. Stonier be "downsized.").

[16] J.A. at 449 ¶ 5 (Smart November 21, 1991 memo).

[17] District Court Paper 119 at pp. 1-5 ¶ 7; J.A. at Stonier Aff. pp. 570-572 ¶¶ 2-9.

1. That in June 1991 she had been scheduled for discharge by her supervisor Bruce Platt effective July 1, 1991, when that was not true;[18]
2. That no one, not even New Ventures had interest in her business plan at the time of her discharge, when that was not true;[19] [20]
3. That New Ventures had no funding at the time of her discharge, when that was not true;[21] and
4. That there was no point in her trying to find an opening in her former job function in sales support at the time of her discharge as it had been eliminated, when that was not true. [22, 23]

The District Court concluded "if Stonier was fraudulently induced to sign the TFSA, she can maintain her action", and that "[t]he evidence demonstrates only an attempt to find funding for her project and an inability to do so. Stonier must do more than just allege that there was attempt to defraud her, and she has failed to produce any evidence to that

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[18] J.A. at Platt dep. at 459-461, 463, 465, 467-468 at 57:13-58:2; 58:10-15; 62:7-11,19,20; 63:7-14; 64:1,2,6-10; 65:7-66:7; 67:12-24; 76:3-10; 82:9-19; 83:15-84:5; 91:1-93:13.

[19] J.A. at McManus dep. at 416-421, 427-428 at 18:18-24:10; 25:2-7; 26:12-22; 30:11-38:16; 62:6-68:16.

[20] J.A at 450 at ¶ 9, Mr. Smart's November 21, 1991 memo confirming Ms. Stonier's "business vision is very relevant to DIGITAL's likely future business directions" at the time he was laying her off.

[21] J.A. at McManus dep. at 416 at 18:18-20:2; 417 at 21:9-23:20; and 419 at 30:11-32:18.

[22] J.A. at Stonier Sept. 27, 1996 dep. at 146:14-147:11.

[23] J.A. at 470 ¶ 19, Respondent Interrogatory Answer.

effect." [A30]. However, the District Court failed to consider deposition testimony given by Mr. Platt as to whether she was or was not scheduled for downsizing when transferred to Mr. Smart's control: [24]

[Platt dep. March 24, 1997 at J.A. 459 at 57:25-58:2]:

Q. At that time, was Pam scheduled to be transitioned out of your organization?

A. No.

Mr. Platt's statement directly contradicts Mr. Smart's statement that Ms. Stonier was scheduled for layoff upon which the Second Circuit and District Court relied:

[Ron Smart November 21, 1991 memo]:

> A. Pam was scheduled for downsizing in the U.S. Field organization but instead was brought to Maynard in order for her to develop a specific new business venture; and
>
> B.1 Pam was scheduled for downsizing in the USA Field organization, EIS cost center ___ manager ____ effective the end of June 1991. [25]

The District Court ignored deposition testimony given by Paul McManus, [26] that contradicts Mr. Smart's written statements:[27]

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[24] J.A. at Platt dep. at 459-461, 463, 465, 467-468 at 57:13-58:2; 58:10-15; 62:7-11,19,20; 63:7-14; 64:1,2,6-10; 65:7-66:7; 67:12-24; 76:3-10; 82:9-19; 83:15-84:5; 91:1-93:13.

[25] J.A. at 449 at ¶ A and B.1, Mr. Smart 's November 21, 1991 memo.

[McManus dep. March 21, 1997 at J.A. 419 at 32:9-14, about lack of funds in New Ventures per Mr. Smart[28]]:

Q. Did that have any impact on the total budget of new ventures group?

A. No.

[McManus dep. March 21, 1997 at J.A. 427 at 63:9-11, 17-20; 65:4-9, 15-19, 23-66:3 showing Mr. Smart never submitted Ms. Stonier's plan for funding]:

Q. Is it your position, Mr. McManus, that somebody at Digital determined that Pam's business plan was not potentially viable and profitable on its own?

...

A. I don't recall the plan being complete and presented to the body that approves them for my organization. I can't speak for others in the company, but I can speak for my organization.

...

Q. Exhibit 3 then contains a document entitled "Proposal for Development of Thinkworks," a software driver, its knowledgeware applications, executive desktop, and its related services portfolio, submitted by Pam Stonier, Dated November 26, 1991 ...

...

Q. To the best of your recollection, you have never seen it?

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[26] J.A. at McManus dep. at 416-421, 427-428 at 18:18-24:10; 25:2-7; 26:12-22; 30:11-38:16; 62:6-68:16.

[27] J.A. at 449 at ¶¶ A, 3, 5, 7, Mr. Smart's November 21, 1991 memo.

[28] See *Id.* at ¶ 5.

A. To the best of my recollection, I don't think I have seen it.

Q. Does it appear to be a complete business plan?

...

A. It has a table of contents.

Q. Does that table of contents have point headings for all of the sections that you would require for a complete business plan when you were at Digital?

A. At a top level, yes.

The Second Circuit erred further when it concluded "[s]ince Stonier does not allege that she was induced to sign the TFSA by any fraudulent misrepresentations, her wrongful discharge claim fails as a matter of law." [A6] Ms. Stonier did allege such fraud on the record. [29, 30, 31]

Had Ms. Stonier been privy to the untruthful correspondence between Mr. Smart and his management she would never have signed the TFSA and would have insisted on New Ventures reviewing her business plan.[32] Over the years following Ms. Stonier's discharge, "Digital became one of the first Fortune 500 companies to actively use the Web for marketing, clearly demonstrating the business potential of the increasingly Web-centric Internet, while

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[29] 2nd Cir. CA Appellant Br. at p. 26 at ¶ 2-p. 31 at ¶ 7.

[30] 2nd Cir. CA Reply Br. at p. 1 at ¶ 1; p. 2 at ¶ 2 bottom-p. 3 top.

[31] 2nd Cir. CA Petition for Rehearing and Rehearing En Banc of Appellants at p. 29-34.

[32] J.A. at 471, Mr. Smart's October 4, 1991 memo.

benefiting the corporation at the same time,"[33] building on the research in Mr. Smart's and Mr. Fuller's organization while Ms. Stonier was assigned to them between 1989 and 1992 and after.[34, 35, 36]

B. Where the Courts Erred Regarding Stonier.

Petitioner Stonier is not asking this Court to make a business decision as to whether Digital should or should not have discharged her. She is asking this Court to review the order entered by the Second Circuit affirming the District Court's Order on the bases that both courts erred under Rule 56 when they 1) weighed prima facie evidence against this non-movant that conflicted with that upon which the Courts relied in granting and affirming judgment for Respondent, 2) overlooked Petitioner's allegations of fraud regarding circumstances under which she signed her severance agreement (the TFSA), and 3) usurped the role of the factfinder in substituting the Court's judgment for that of the jury on questions requiring assessment of evidence by the jury concerning motive, intent, bad faith, and credibility in the context of employer prevarication and Petitioner's allegations of fraud concerning her discharge.

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[33] J.A. at 567, 1997 Digital Web page.

[34] J.A. at 565, Digital's 1997 Web page showing Ron Smart's organization under Sam Fuller at the forefront of applied research for the type of business development that was the subject of Ms. Stonier's ideas and business vision.

[35] J.A. at 567-568, 1997 Digital Web page.

[36] J.A. at Platt dep. at 461 at 65:9-10.

C. Statement and Facts of Petitioners Thinkworks and Omnimensions.

Petitioners contend that Digital breached contractual obligations to the Petitioners in a manner that constituted tortious behavior and trade secret violation and that by these acts and inaction Respondent ruined Thinkworks' and Omnimensions' professional reputations in the banking industry, and drove the Petitioner corporations out of business. [37, 38] The contracts at issue consisted of a June 10, 1992 written contract between Thinkworks and Digital,[39] and two oral agreements between Thinkworks and Digital. [40, 41]

In January 1992, following receipt of her discharge notice from Respondent, Petitioner Stonier and four other individuals organized two Vermont corporations - Omnimensions, Inc. and Thinkworks,

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[37] J.A. at 305-306, CLF agenda; J.A. at 307-365, CLF mailing list shows Digital marketed its competitive CLF event to banks while under contract with Thinkworks; J.A. at 305-306, CLF Agenda showing Digital conducted a Corporate Leaders Forum while under contract with Thinkworks, without Thinkworks, in breach of the terms of the written Thinkworks contract at J.A. 252 ¶ 1, violating trade secret restrictions at J.A. 249; J.A. at 269-273, Petitioner's document advising Digital's Bruce Ryan (who conducted competitive CLF) to conduct CLF for banks *with* Petitioners).

[38] District Court papers 69 (2nd Amended Complaint); 119 at pp. 5-19; 120 at pp. 1-6, 10-16, 20-25; 147 at pp. 2-7.

[39] J.A. at 266, signature page of Thinkworks contract.

[40] J.A. at 259-260, 366, 520-521, 526-537 (proof regarding oral agreement #1).

[41] J.A. at 408, 409 (proof regarding oral agreement #2).

Inc. Omnimensions was to develop and sell business-to-business e-commerce knowledge and information management services. Thinkworks was solely to do business with Digital. [A13]. Digital's Mr. Wysocan began working with Ms. Stonier and her new companies on February 22, 1992 to develop a risk management consulting service that Petitioners Omnimensions and Thinkworks and Respondent Digital intended to jointly sell to banks, using bulletin board technology and knowledge products for disseminating new regulatory knowledge to the banking industry. The impetus making this business a viable concept was the December 19, 1991 passage of new bank legislation by Congress (the Federal Deposit Insurance Improvement Act of 1991 ["FDICIA"]) and emerging Internet technologies. [42, 43, 44]

Based on positive feedback from banks from a market validation workshop held by Omnimensions for Digital on May 8, 1991,[45] Digital contracted with Thinkworks on June 10, 1992, accepting Module 1 out of three Modules of the contract, which Module 1 Petitioners contend was for the purpose of marketing a joint Digital/Thinkworks Risk Management Consulting Practice, and for no less purpose.[46] Petitioners further contend that the sole source of consideration for each

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[42] J.A. at 269-273, Stonier/Wysocan memos.

[43] (Note: known today as Worldwide Web and Internet, IntraNet, ExtraNet technologies and Web page applications.)

[44] J.A. at 366-373, Thinkworks/Digital FDICIA seminar materials; J.A. at 522-524, Digital marketing flyer prepared for the Thinkworks/Digital FDICIA seminar.

[45] J.A. at 254; (Also, Note: Omnimensions' workshop issue was remanded by 2nd Cir. CA.)

[46] J.A. at 247-268, Thinkworks June 10, 1991 contract.

party was to come from shared revenue from their joint sales of risk management consulting and related Digital goods and services post completion of Module 1. Petitioner alleges that Digital competed unfairly and reneged on its agreement to give Thinkworks access to the agreed upon sales and revenue opportunity, and as a result Thinkworks and its third party co-program developers were not compensated for their work.

D. Where the Courts Erred Regarding Thinkworks and Omnimensions.

Petitioners ask this Court to review the Second Circuit's judgment affirming the District Court's order granting summary judgment for Respondent against Thinkworks, Inc. and Omnimensions, Inc. on the bases that both courts erred under Rule 56 when they 1) usurped the role of the jury in assessing intent to contract, and state of mind regarding motive, bad faith, and credibility in the context of breach of contract, business torts, and trade secret violation issues; and 2) misunderstood facts and overlooked evidence, and therefore erred in ruling as a matter of law on some of those issues.

a) Second Circuit and District Court Erred by Reconstructing the Thinkworks Contract and then Relying on the Resulting Diminished Version to Infer Intent to Contract Concerning the Purpose of the Contract and Bilateral Obligations of the Parties including Agreement Regarding Consideration.

The Second Circuit and District Court erred when they reconstructed the Thinkworks contract and interpreted it to have a meaning less than that written

on its face, and less than intended between the parties. [47, 48] Petitioner's contend that the Courts erroneously assigned limited purpose to Module 1 because they did not read it together with the full wording of the Work Statement. [49, 50, 51] Petitioner Thinkworks contends that Digital's obligations went well beyond the finding of both courts that Digital's sole obligation under Module 1 was to make payment on the two invoices totaling $125,000, which Thinkworks sold to the Factor. [A4-5, A14 last ¶; A15 last ¶; A32; A33 2nd ¶]. Module 1 obligated Digital to:

1. Create a revenue-sharing schedule from which to compensate Thinkworks for its work; which Digital did not do.
2. Bring at least 10 of Digital's customers to each seminar; which Digital did not do.
3. Conduct a Corporate Leaders Forum ("CLF") with Thinkworks; which Digital did not do.

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[47] J.A. at 251, 252, Thinkworks Proposal/Contract Title.

[48] 2nd Cir. CA Petition for Rehearing at pp. 12-16.

[49] (District Court erred when it found that "Ms. Stonier on behalf of Thinkworks wrote the contract," [A23] which Petitioners pointed out at 2nd Cir. CA Br. Of Appellants at p. 10 and Petition for Rehearing at p. 11).

[50] J.A. at 295-304 (The Omnimensions/Digital agreement remanded by the Second Circuit for trial, clearly establishes the historical context of purpose for the Thinkworks contract, and is referenced in the Thinkworks contract as its initial source – see particularly J.A. at 295 and 304 which shows that Mr. Wysocan and Ms. Stonier were jointly writing what became the May 20, 1992 proposal/June 10, 1992 Thinkworks contract.)

[51] 2nd Cir. CA Petition for Rehearing at pp. 9 last ¶ -12 first ¶.

4. Reimburse Thinkworks $125,000 for out-of-pocket costs in connection with developing and delivering the Module 1 seminar series; which Digital did late.
5. Participate in developing content for the seminar series; which Digital did.
6. Jointly develop the market for the Risk Management Consulting business with Thinkworks; which Digital did not do.
7. Turn over any fee income from the seminar beyond its $125,000 out-of-pocket cost reimbursement to Thinkworks to MIT's non-profit International Financial Services Research Center as a donation; which Digital did not do because Digital did not bring any fee paying customer to the seminar series, but ran a competitive free seminar (CLF) instead.
8. Engage in the ongoing sale, jointly with Thinkworks, of the product and services developed under the Thinkworks contract according to an agreement for revenue sharing, for as long as there is a market of need for these services; which Digital did not do.
9. Conduct status meetings to evaluate and reset expectations for the parties' performance of their obligations on a periodic basis, and make adjustments as necessary; which Digital did do, and in the course of these meetings created the oral agreements for further work between Digital and Thinkworks; and
10. Be bound by the full terms of the written Work Statement, the Digital Consultancy Agreement, and the Thinkworks Confidentiality and Non-

Disclosure Agreement attached to the Work Statement.[52, 53, 54, 55]

b) Second Circuit and District Court Failed to Consider Prima Facie and Circumstantial Evidence that Petitioners Fully-Performed per Oral Agreements.

Shortly after Thinkworks began work on Module 1, developing the content for the marketing seminars, Digital's Mr. Wysocan made oral request that Thinkworks contract with Omnimensions to develop the risk management computer bulletin board software for Digital, as identified in Module 2, and asked Thinkworks to perform portions of the Module 2 and 3 risk management methodology training of Digital's Financial Application Business systems ("FABS") consultants and salesforce, in exchange for shared revenue from future sales.[56, 57, 58, 59] On the bases of

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[52] Note: a Factor is "A firm (typically a finance company) that purchases a firm's receivables at a discount and is responsible for processing and collecting the balances of these accounts." Blacks Law Dictionary, Abridged 6th Ed.

[53] J.A. at 248, 249, 252, 253, 254, 255, 259, 262, 263, 264, 265, and 266 (Pages referencing contractual obligations of Digital under Module 1 of the Thinkworks contract).

[54] J.A. at 101-112 (Digital Consulting Services Agreement).

[55] Appendix at A24 (District Court Magistrate's Report).

[56] J.A. at 520-521, 526-538 (Thinkworks/Digital correspondence dated 8/27/92, just before first Module 1 seminar was delivered, in which Thinkworks states to Mr. Wysocan: "Our bulletin board (knowledge net) will be up and running next week;" sample bulletin board screens; Omnimensions write-up and reference to Digital's assigning a product code to the service in time for the seminars.).

the evidence herein referenced. Digital has not demonstrated a lack of Petitioner's evidence concerning these disputed facts, and cannot convincingly claim that it did not ask for nor receive that work from Thinkworks and Omnimensions in connection with oral agreements.[60, 61] This additional work was in addition to, and did not vary or contradict the written contract at Module 1.[62]

c) Second Circuit and District Court Erred in Finding Thinkworks Contract Invalid Because they Relied on District Court's Errors in Misconstruing Digital's Obligations; Misstating Written Factor Purchase and Sale Agreement Terms; and Misstating Written Release Terms Between Digital and the Factor.

The Second Circuit and the District Court erred when they failed to acknowledge Digital's multiple obligations under bilateral Module 1 (*see* § D this Petition at pp. 15-18 top). These obligations went well

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[57] J.A. at 366 (Statement in the Thinkworks/Digital seminar marketing material: "you will have the option of maintaining ongoing interaction with this team and additional industry experts through enrollment in an electronic bulletin board, which will be up and running at the seminar.").

[58] 2nd Cir. CA Petition for Rehearing at pp. 20-22 2nd ¶.

[59] J.A. at 408 (Internal Digital memo dated Aug 11, 1992 from a FABS consultant referring to salesforce and FABS rep training.).

[60] *Id.*

[61] 2nd Cir. CA Petition for Rehearing at pp. 19-24 top.

[62] District Court papers at 119 pp. 12, 14; 120 pp. 12-16; 147 pp. 2-5; 2nd Cir. CA Br. of Appellant at 42-44 top.

beyond the finding of both courts that Digital's sole obligation under Module 1 was to make payment on the two invoices totaling $125,000, which Petitioners contend did not constitute consideration but was solely payment for cost reimbursement which limited receivable Thinkworks sold to the Factor. That error caused the District Court to err when it ruled that Thinkworks no longer had a valid contract after it assigned its right to collect those invoices directly from Digital. The Court made this error when it adopted Respondent's misstatements as its own concerning the content of the terms of the Purchase and Sale Agreement between Thinkworks and the Factor, and the settlement agreement release between the Factor and Digital and found that Thinkworks assigned all of its rights to receive consideration from Digital for work performed to the Factor. It makes this error at [A17, A32]. Nowhere does the Factor's Purchase and Sale Agreement say that, nor does the settlement release signed by the Factor.[63]

The District Court's reasoning is factually and legally incorrect.[64, 65] [A24] In engaging in its banking transaction with the Factor to collect the explicitly identified limited receivable, Thinkworks did not assign and Digital was not excused from their further obligations to perform work, or any rights or

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[63] J.A. at 134-140 (Factor Purchase & Sale Agreement and Release); 2nd Cir. CA Appellant Br. at pp. 3-6, 11.

[64] J.A. at 134-140 (Factor Purchase & Sale Agreement and Release).

[65] District Court paper 147 at p. 1, paper 119 at p. 17 ¶¶ 26, 27, 29, paper 120 at p. 1 ¶ 3; 2nd Cir. CA Br. of Appellants at pp. 9-19 top; 2nd Cir. CA Reply Br. of Appellants at p. 22; 2nd Cir. CA Petition for Rehearing at pp. 24-29.

obligations not directly connected to the limited financial transaction with the Factor. Digital's and Thinkworks' obligations and entitlements under the Thinkworks contract were multiple and bilateral. When Thinkworks assigned its right to directly collect $125,000 from Digital, because Digital was planning to be very late in making its scheduled payments to Thinkworks, by the District Court's reasoning, the original purpose of the contract – Thinkwork's production of a seminar series to announce a risk management consulting practice – disappeared and was subsumed into the financial transaction, and the purpose of the contract became solely a contract to collect expense reimbursement. If that had been the case then Thinkworks would have been under no further obligation to perform the work of developing and delivering the seminar series once it sold its receivable invoice for cost reimbursement to the Factor, which of course was not the case.

These errors made by the District Court, and affirmed by the Second Circuit, were fatal to Thinkworks' standing to bring its claims against Respondent under tort, breach, and doctrine of good faith and fair dealing causes of action. On the bases of these errors, Thinkworks respectfully requests that this Court review the Second Circuit's Order affirming the District Court's findings and judgment for movants.

d) Second Circuit and District Court Overlooked Material Facts and Evidence Supporting Thinkworks' Trade Secret Misappropriation Claim.

The Second Circuit and the District Court erred when they misconstrued the source of the trade secret information at issue and determined that the

information that Thinkworks sought to protect originated mostly with Digital, and was therefore not protectable as Thinkworks' trade secrets. [A5-A6, A26-A27] If the information primarily originated with Digital, Digital would not have hired Thinkworks under contract to work with Coopers & Lybrand, Bear Stearns, MIT, and all the other Thinkworks co-development third party alliance partners to develop the information for proper use by Digital.[66]

The Second Circuit and the District Court erred further because they failed to recognize that Petitioner Thinkworks took the necessary legal steps to protect the information, and because they missed the point that Thinkworks based its claim upon the Respondent for misappropriation of trade secrets not on the principle that Respondent was not entitled to the proper use of the trade secrets under the contract, but rather that Respondent wasn't entitled to use Thinkworks trade secrets because Respondent failed to pay for them. Petitioner Thinkworks brought these issues and supporting evidence to the attention of both Courts, which both Courts ignored.[67]

e) Second Circuit and District Court Overlooked Material Facts and Evidence Showing that Digital Unfairly Conducted a Free Competitive Corporate Leaders Forum ("CLF") Event Parallel with Petitioner Thinkworks' Fee-Based FDICIA Seminar Program.

[66] J.A. at 254-255 at ¶ 1.

[67] District Court paper 147, 2nd Cir. CA Petition for Rehearing at pp. 24-29; 2nd Cir. CA Reply Br. of Appellants at p. 25.

Digital admits that the purpose of conducting Corporate Leaders' Forums was to generate business for Digital. [68] By excluding Thinkworks from participating in the CLF as required under the contract [J.A. at 252], Digital escaped having to share such ensuing revenue. Petitioners pointed out to the Second Circuit and District Court that the District Court erred when it found that Petitioners claimed Digital put on a Corporate Leaders Forum ("CLF") *after* the Thinkworks contract was terminated [A26]. Digital's competing CLF was put on by Digital on November 15-17, 1992, and the Thinkworks seminars ran through December 3, 1992.[69] The competitive CLF was put on by Digital in the midst of the Module 1 contract with Thinkworks. Petitioners submitted detailed facts illustrating that the seminar was indeed a knockoff.[70]

Petitioner Thinkworks contends that in all due respect for the Courts and counsel for Respondent, they are not professionally qualified to make the factual subject matter determination as to whether the content delivered at the CLF was or was not a "knock-off" to the subject matter of the Thinkworks Module 1 seminar series. [A26-A27]. Petitioner Thinkworks submits that it is appropriate for this factual issue to be presented to a jury, with evidence fully prepared for trial, including trial testimony.[71]

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[68] J.A. at Behrens August 20, 1997 deposition at 430 at 7:16 thru 431 at 9:19.

[69] J.A. at 305, 439.

[70] District Court papers 119, 120, 147; 2nd Cir. Br. of Appellants at pp. 47-50 top; 2nd Cir. Reply Br. of Appellants at p. 25 top; 2nd Cir. CA Petition for Rehearing at pp. 26-29.

[71] 2nd Cir. CA Br. of Appellants at pp. 34-49.

f) Second Circuit and District Court Erred in Confusing Agency and Third Party Beneficiary Law and thereby Erred in Dismissing Omnimensions Claims.

Petitioners submit that the Second Circuit erred when it affirmed the District Court's dismissal of Omnimensions' breach of contract claim against Respondent on the legal premise that "Omnimensions's use of agency law is novel but ultimately unavailing" on the bases that Omnimensions' name did not appear in writing at Module 1, and that its close relationship to Thinkworks "would make it patently unfair to give it the power to bind Digital to Omnimensions." [A21-A22]. Thinkworks submits that the District Court is confusing third party beneficiary law with agency law, and that under agency law closeness of the parties is not a legal basis for obviating a valid agency relationship in the face of a contract that establishes such a legal relationship. [72]

g) The Second Circuit and District Court Erred in Overlooking Facts and Evidence Supporting Reasonable Reliance on Promises Made by Respondent.

Petitioners Thinkworks and Omnimensions submit that the District Court erred when it ruled against their promissory estoppel claims because "injustice can be avoided," regarding payment to Thinkworks and its third party co-developers, "only by enforcement of the promise" of payment from revenue sharing relied on. [A25] This is especially so since Digital breached the written terms of the contract at its

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[72] District Court papers 119, 120, 147; 2nd Cir. CA at pp. 42-44; 2nd Cir. CA Petition for Rehearing at pp. 20-22.

page 3 [J.A. 252] by failing to complete the revenue sharing agreement referenced at that page. Sufficient written memorialization appears in the contract which explicitly communicates that revenue sharing was to be the form of consideration for all Modules for all parties, including Digital. [73] Petitioners submit that to silence testimony by Thinkworks' third-party co-developers concerning promises of consideration made by Digital upon which these co-developers relied and were induced to perform their work for six months is an intolerable injustice. All Thinkworks experts ended up unpaid at the end, and were replaced by a competitive, parallel team of experts in breach of the contract, whereby Digital reaped the benefits of advancing a winning risk management consulting practice, and protected employment for its management and staff while escaping having to share revenue with Thinkworks and its third parties.[74]

REASONS FOR GRANTING THE WRIT

This case has numerous causes of action and is therefore a good example of how the District and Appellate courts are becoming overzealous in their execution of standards established in the 1986 trilogy [75] of this Court's decisions concerning Rule 56

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[73] District Court papers 119 at pp. 6, 120, 147; 2nd Cir. CA Reply Br. of Appellants at p. 10; 2nd Cir. CA Petition for Rehearing at pp. 8-24.

[74] J.A. at 305-306, Competitive CLF Agenda; J.A. at Behrens dep. at 431 at 11:9-12:13.

[75] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

proceedings. By agressively assessing evidence submitted by the non-movants, the Second Circuit and District Court exceeded those standards and improperly "interpreted the trilogy 'to permit courts to draw inferences in defendants' favor, to weigh evidence, to decide the credibility of witnesses, and to require plaintiffs to prove their cases at the summary judgment stage'." [76]

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE IT IS TIME TO REVIEW THE GROWTH OF AGGRESSIVE REVIEW OF EVIDENCE IN RULE 56 PROCEEDINGS BY U.S. CIRCUIT AND DISTRICT COURTS TO DETERMINE IF SUCH PRACTICES HAVE BECOME OVERZEALOUS, EXCEEDING THE STANDARDS INTENDED BY THE 1986 TRILOGY, AND THEREBY THREATENING TO OBVIATE THE SEVENTH AMENDMENT ROLE OF THE JURY.

The limit of judicial usurpation of the province of the jury is clearly established by this court:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

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[76] Gregory, Robert J., *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 Fla. St. U.L. Rev. 689, 706 (1996) (quoting McGinley, Ann C., *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 229 (1993).

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344-45 (1990).

The Second Circuit and the U.S. District Court in failing to consider prima facie and circumstantial conflicting evidence submitted by the Petitioners; reconstructing the Thinkworks contract to omit critical written subject matter, terms and conditions; drawing inferences and substituting its evaluation for that of the jury concerning intent, motive, and credibility in the context of employer prevarication and oral agreements violated the rule long established in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970), and recognized in *Anderson* at 255, that in deciding Rule 56 motions:

> Credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Petitioners submit that their constitutionally protected right to a jury trial has been denied on the basis of improper judicial usurpation of the role of the jury and therefore review of the Second Circuit's Order is warranted.

II. CERTIORARI SHOULD BE GRANTED BECAUSE PUBLIC POLICY AND THE PUBLIC INTEREST SUPPORT THE NEED FOR FURTHER GUIDANCE FROM THIS COURT CONCERNING THE PRACTICE BY U.S. DISTRICT COURTS OF CLEARING THEIR CALENDARS IN RULE 56 PROCEEDINGS BY EXCEEDING THE STANDARDS INTENDED BY THE 1986 TRILOGY CONCERNING JUDICIAL ASSESSMENT OF FACTS AND EVIDENCE AND SUBSTITUTING THE COURT'S JUDGMENT FOR THAT OF THE JURY.

Petitioners take the position that Respondent failed to prevail in its attempt to "point[...] out to the district court – that there is an absence of evidence to support the nonmoving party's case," *Celotex*, 477 U.S. at 325, and that therefore review of the Second Circuit's Order is warranted.

A. Overzealous judicial usurpation of the role of the jury in Rule 56 proceedings wastes precious court resources by causing all parties needless costs in bringing and defending against motions, appeals and petitions that must be considered by the higher courts.

Much has been written since Rule 56 underwent its major overhaul in this Court in 1986 that presents broad analysis of the strengths and challenges of the transformation of summary judgment from "a rarely used procedural tool into a major gatekeeping device in

federal litigation."[77] It would be senseless to argue against the wisdom of the Court's having set needed standards to check spurious claims, that well-serve the challenge of managing the enormous volume of cases vying for addition to the calendar, and we are not doing that here. But when the courts reach too far in raising the bar at summary judgment to full-dress trial standards, absent the opportunity for the plaintiff to present all the evidence, and with witnesses silenced, and "a grant of summary judgment is reversed on appeal, there is a substantial waste of judicial resources at the preliminary stage of the case." [78]

B. Overzealous judicial assessment of facts and evidence causes meritorious claims to be unjustly compromised.

It is time to question whether keeping the court calendar manageable under Rule 56 is serving the equal just interests of all parties, or is managing the calendar at the expense of meritorious civil actions. U.S. Cir. Judge Patricia M. Wald states:

> [R]esearch and observations in my own D.C. Circuit suggest that summary judgment has

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[77] *See* Gregory, *supra* fn. 76 at 690, referencing Issacharoff, Samuel & Loewenstein, George, *Second Thoughts about Summary Judgment*, 100 Yale L.J. 73 (1990); McGinley, *supra* fn. 76; *Miller v. Federal Deposit Ins. Corp.*, 906 F. 2d 972, 974 (4th Cir. 1990); *Matsushita*, *supra* fn. 75; and comparing defendant's burden as moving party in *Celotex*, 477 U.S. at 323 with plaintiff's burden as nonmoving party in *Anderson*, 477 U.S. at 252, *supra* 75.

[78] *See* Gregory, *supra* fn. 76 at 717.

> assumed a much larger role in civil case dispositions than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake. A reassessment of Rule 56 and its erratic history may be in order, lest it develop too casually into a stealth weapon for clearing calendars.[79]

CONCLUSION

Review of the Second Circuit's Order affirming the District Court's findings concerning sufficiency of evidence and rulings as a matter of law reveals numerous errors, and raises important questions about the court's contemporary role at the summary judgment stage that are ripe for review now fourteen years post-trilogy. In the interests of doing the right thing for the Petitioners' case, and refreshing guidelines concerning the extent to which the courts may usurp the role of the jury in Rule 56 proceedings, and for all other foregoing reasons, Petitioners ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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P.O. Box 607
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(802) 479-0568

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[79] Wald, Patricia M., *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1898 (1998)

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 98-9648

PAMELA STONIER,
THINKWORKS, INC. AND
OMNIMENSIONS, INC.,

Plaintiffs-Appellants,

v.

DIGITAL EQUIPMENT CORPORATION

Defendant-Appellee.

Appeal from the United States District Court
For the District of Vermont
Docket No. 2:96-CV-90

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED

CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of September one thousand nine hundred and ninety-nine.

PRESENT:
Hon. John M. Walker, Jr.,
Hon. Pierre N. Leval,
Hon. Rosemary S. Pooler,
Circuit Judges.

Filed Sep 28, 1999

- -x

PAMELA STONIER, THINKWORKS, INC., and OMNIMENSIONS, INC., Plaintiffs-Appellants,

-v.- 98-9648

DIGITAL EQUIPMENT CORPORATION,
Defendant-Appellee.

- -x

APPEARING FOR APPELLANTS:
CHARLES S. MARTIN,
Martin & Associates
Barre, Vermont

APPEARING FOR APPELLEES:

SHEPARD M. REMIS, P.C., Goodwin, Procter & Hoar LLP Boston, Massachusetts (Dori C. Gouin, Goodwin, Procter & Hoar LLP, Jerome F. O'Neill, O'Neill Crawford & Green, Burlington, Vermont, on the brief).

Appeal from the United States District Court for the District of Vermont (Sessions, J.).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is **AFFIRMED** in part and **REMANDED**.

Plaintiff-appellant Pamela Stonier was employed by Digital Equipment corporation ("Digital") until her discharge in 1991. Faced with the prospect of unemployment, Stonier created two companies, Thinkworks and Omnimensions, to contract with Digital and create a risk management consulting practice helping banks to conform with new FDICIA requirements. This case primarily concerns the extent to which Digital contracted with Stonier and her companies.

On May 20, 1992, Thinkworks submitted a lengthy offer to Digital detailing three separate "Modules" for Digital to accept or reject. Module 1 proposed a seminar series. Modules 2 and 3 described

a far-reaching joint venture to launch a risk management consulting practice. On June 10, 1992, Peter Wysocan accepted only Module 1 on Digital's behalf. Module 1 was described in the Thinkworks offer as: "FDICIA Seminar Program – TOTAL COST $125,000." A WRITTEN AGREEMENT FOR Module 1 was signed by Thinkworks and Digital. Thinkworks prepared the seminar series and was properly reimbursed.

Appellants argue, ultimately unpersuasively, that Digital accepted Modules 2 and 3 in addition to Module 1. Appellants advance diverse theories of oral modification, trade custom and practice, and promissory estoppel to press their entitlement to the expected benefits of the other two Modules. However, when a contract is clear on its face, its interpretation is a matter of law for the court. See Lawrence-Lynch Corp. v. Department of Envtl. Management, 467 N.E.2d 838, 840 (Mass. 1984); Paradise Restaurant, Inc. v. Somerset Enters., Inc., 671 A.2d 1258, 1261 (Vt. 1995). Thinkworks gave Digital a clear choice of which Modules to accept; Digital accepted only Module 1. Any claimed reliance on oral promises was unreasonable as a matter of law given the existence of a clear contract. See Coll. V. PB Diagnostic Sys. Inc., 50 F.3d 1115, 1124 (1st Cir. 1995) (interpreting Massachusetts law); Housing Vermont v. Goldsmith & Morris, 685 A.2d 1086, 1089 (Vt. 1996). Digital's contractual obligations to Thinkworks were limited to paying $125,000 for the seminar series and Thinkworks has made no claim with respect to this payment. Thus, summary judgment was appropriate

on all of Thinkworks' claims against Digital and on those of Omnimensions' claims that rely on the existence of a broader contract between Digital and Thinkworks.

Thinkworks also sued Digital for misappropriation of trade secrets. This claim fails as a matter of law. The trade secrets Thinkworks alleges were stolen include: "Identifi[cation of] the business departments of banks who would be affected by FDICIA, as well as the goods and services of [Digital] that appropriately should be marketed to banks to help them accomplish prompt corrective action in revamping their finance organizations" and regulatory interpretations provided by industry experts and presented at the Thinkworks seminars. **[Stonier Reply Br. 18-19].** We need not decide which state's law applies because this information is not of the kind protected as a trade secret by either Vermont or Massachusetts law. Furthermore, even if the seminar content included trade secrets, the record shows that the parties expressly contracted that Digital would be vested with any and all trade secret rights in that work product. **[J.A. 106].**

For Thinkworks' seminar information to be protected as trade secrets, it must not have been "readily ascertainable by proper means . . . . " Vt. Stat. Ann. Tit. 9, § 4601(3); see also Jet Spray Cooler, Inc. v. Crampton, 282 N.E. 2d 921, 925 (Mass. 1972) ("The crucial issue to be determined in cases involving trade secrets, therefore, is whether the information sought to be protected is, in fact and in law,

confidential."). The information at issue here cannot qualify as secret. The seminar information originated primarily with Digital itself and was readily available to anyone in the industry.

Stonier's allegations of fraud and wrongful discharge were also appropriately resolved against her by summary judgment. Upon her termination, Stonier signed a Transitional Financial Support Agreement ("TFSA"); in exchange for $25,546.50 and continuing medical benefits, Stonier waived her right to bring any claims against Digital. Stonier argues that her signature was fraudulently induced thus circumventing the TFSA's preclusive effect on this suit. The fraud Stonier actually alleges, even read in the light most favorable to her, is fraud inducing her to transfer into a new position from which she was ultimately fired. Since Stonier does not allege that she was induced to sign the TFSA by any fraudulent misrepresentations, her wrongful discharge claim fails as a matter of law.

A sufficient factual dispute does exist regarding a co-sponsorship fee of $15,000 that Digital allegedly agreed to pay Omnimensions for a focus group event at the Massachusetts Institute of Technology. While the record is sparse, Omnimensions presented facts sufficient to withstand summary judgment on this one claim. The elements of a contract are at least arguably present. Viewed in the light most favorable to Stonier, an offer can be found in a handwritten fax from Stonier to Wysocan **[JA 69-72]** and a contract that was drawn-up and edited by Wysocan but never signed. **[JA 295-**

99]. A reasonable jury could find that Digital accepted the contract by promising to sign it on the day of the presentation, **[Stonier Br. 41]** or by accepting Omnimensions' services. The focus group event was conducted on May 8th, 1992, and Digital attended. Thus, there is at least some evidence in the record to support Omnimensions' Claim that Digital agreed to co-sponsor the event. The case is therefore remanded for further proceedings on this claim only. If Omnimensions ultimately prevails, its recovery is limited to $15,000 plus interest.

We have carefully considered appellants' remaining arguments and find them to be without merit. For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED** in part, **VACATED** and **REMANDED** in part.

FOR THE COURT
Karen Greve Milton, Acting Clerk:
By: s/Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
District of Vermont

PAMELA STONIER, THINKWORKS, INC. and OMNIMENSIONS, INC., Plaintiffs,

v. File No. 2:96-CV-90

DIGITAL EQUIPMENT CORPORATION, Defendant.

ORDER

The Report and Recommendation of the United States Magistrate Judge was filed September 22, 1998. Plaintiffs timely filed their objections to the Report and Recommendation on October 16, 1998. Defendant filed opposition to Plaintiffs' Objection on October 26, 1998, and Plaintiffs replied to the Objection on November 13, 1998.

A district judge must make a *de novo* determination of those portions of a magistrate judge's report and recommendation to which an objection is made. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b); *Perez-Rubio v. Wyckoff*, 718 F.Supp. 217, 227 (S.D.N.Y. 1989). The district judge may "accept, reject, or modify, in whole or in part, the magistrate's proposed findings and recommendations." *Id.*

After careful review of the file, the Magistrate Judge's Report and Recommendation and the objections, opposition and reply, this Court ADOPTS the Magistrate Judge's recommendation in full for the reasons stated in the Report.

Defendant Digital Equipment Corporation's motion for summary judgment is GRANTED (Paper #114). Defendant's motion for expenses is DENIED (Paper #107).

THIS CASE IS CLOSED.

Dated at Burlington, in the District of Vermont, this 17th Day of November, 1998.

s/William K. Sessions III
U.S. District Judge

UNITED STATES DISTRICT COURT
District of Vermont

PAMELA STONIER, THINKWORKS, INC. and OMNIMENSIONS, INC., Plaintiffs,

v. **JUDGMENT IN A CIVIL CASE**
CASE NUMBER: 2:96-CV-90

DIGITAL EQUIPMENT CORPORATION, Defendant.

_____ **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order (Paper No. 150) filed November 17, 1998, the Magistrate Judge's Report and Recommendation (Paper No. 145) is adopted. Defendant's Motion for Summary Judgment (Paper No. 114) is granted and defendant's Motion for Expenses (Paper No. 107) is denied. JUDGMENT is hereby entered for defendant Digital Equipment Corporation against plaintiffs Pamela Stonier, Thinkworks, Inc., and Omnimensions, Inc.

Date: November 17, 1998 RICHARD PAUL WASKO
Entered 11/17/98 Clerk, by s/ Anna M. Nealley, Deputy Clerk

UNITED STATES DISTRICT COURT
District of Vermont

PAMELA STONIER, THINKWORKS, INC. and OMNIMENSIONS, INC., Plaintiffs,

v. File No. 2:96-CV-90

DIGITAL EQUIPMENT CORPORATION, Defendant.

MAGISTRATE JUDGE'S REPORT
AND RECOMMENDATION
(Papers 107, 114)

Defendant Digital Equipment Corporation ("Digital") has moved for summary judgment on all claims raised in Plaintiffs' Complaint, pursuant to Fed. R. Civ. P. 56. Paper 114. Digital also seeks expenses incurred as a result of Plaintiffs' retention of John Jarosz as an expert. Paper 107.

For the reasons set forth below, I recommend that Digital's motion for summary judgment be GRANTED. Digital's motion for costs is DENIED.

FACTUAL BACKGROUND

On December 16, 1991, Plaintiff Pamela Stonier, a Digital employee then working in Massachusetts, was told by Digital that she was being terminated as part of a involuntary reduction in force. She was informed

that her termination would be effective on February 21, 1992 and that her last day at work would be December 20, 1991. Between these two dates, she remained a Digital employee but was not required to report for work. Digital's Statement of Undisputed Facts, Paper 116, ¶ 1.

As part of her termination from Digital, Stonier signed a Transition Financial Support Agreement ("TFSA"). Paper 116, ¶ 2. Under the TFSA, Digital paid Stonier a lump sum of $25,546.50 and permitted her to continue to participate in Digital's health, life, and dental plan until the end of June 1992. Paper 116, ¶ 2. According to the terms of the TFSA, Stonier accepted these benefits "in full and complete satisfaction of any and all claims of any kind or description that [Stonier has], or have had, or may have against Digital ... and release[d] Digital ... from any liability for such claims." Paper 116, Ex. 4, ¶ 10. The TFSA also stated that "[t]he effect of [Stonier]'s signing this agreement is to prevent [Stonier] from suing Digital ... under ... common law, including without limitation, claims arising from any contract or tort law [or] any other claim arising out of [Stonier]'s employment with Digital or termination of employment with Digital from ... her first employment to the date of this Agreement." Paper 116, Ex. 4, ¶ 10. Stonier maintains that she was duped into signing the TFSA. Paper 119, ¶ 2. Specifically, Stonier claims that she was led to believe that (1) Digital had no interest in funding "her knowledge systems business as an employee" and (2) her position was being eliminated. Paper 119, ¶ 2.

In late 1991 or early 1992, while Stonier was still on Digital's payroll, she learned of the enactment of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA"). Paper 116, ¶ 10; Paper 119, ¶ 8. Stonier believed that FDICIA would affect all banks and require expanded automation of existing and new business processes in most banks. Paper 116, ¶ 11. Stonier believed that Digital's technology could be used to help banks comply with FDICIA. Paper 116, ¶ 11. Specifically, she envisioned a program involving a seminar series, risk management consulting for banks, and the development of an information bulletin board addressing FDICIA compliance. Paper 116, ¶ 12. Stonier maintains that the program also encompassed an overall sales support function that the Plaintiffs and their knowledge team would have provided Digital's financial services sales force. Paper 119, ¶ 10.

In January 1992, Stonier helped form two affiliated Vermont companies, Thinkworks, Inc. ("Thinkworks") and Omnimensions, Inc. ("Omnimensions"). Paper 116, ¶ 9. Omnimensions was to develop Stonier's general business ideas whereas Thinkworks was to do business exclusively with Digital. Paper 116, ¶ 9. Stonier's plan was that Omnimensions would develop technology, lease it to Thinkworks, and then Thinkworks would develop applications for Omnimensions' products exclusively for Digital. Paper 116, ¶ 9. Thinkworks would contract only with Digital; Omnimension[s], which would retain ownership of the technology it developed, could contract with anyone. Paper 116, ¶ 9.

According to Stonier, Digital required Stonier to conduct a focus group workshop in order to validate an industry desire for the services she intended to market. Paper 116, ¶ 13. As a result, Stonier spent February through April 1992 planning such a workshop. Paper 116, ¶ 13. Stonier claims that in March 1992, Digital's Pete Wysocan agreed that Digital would provide Stonier's companies with Digital computer equipment and software to use in developing their services for Digital. Paper 116, ¶ 13. Digital did not provide the equipment, and Stonier purchased the equipment on her own. Paper 116, ¶ 113. Stonier also maintains that Wysocan verbally committed to pay $15,000 to sponsor the workshop. Paper 116, ¶ 14.

On May 8, 1992, Stonier conducted the FDICIA Focus Group at MIT's Sloan School of Management. Paper 116, ¶ 15. Stonier contends that Digital's John Haskard agreed to give MIT some Digital computer equipment and software to use in the seminar series and as part of MIT's remuneration for participating. Paper 116, ¶ 15. Stonier met with Wysocan later in the day. Paper 116, ¶ 15. Stonier maintains that Wysocan had said that he would have a check for her. Paper 116, ¶ 15. He did not have the check at their meeting, and told her he was having difficulty obtaining funding from Digital and that he would make it up to her after July 1. Paper 116, ¶ 15.

According to Digital, after the workshop, Wysocan agreed that Digital should engage Stonier to develop the FDICIA seminar series. Paper 116, ¶ 16. Stonier claims that the agreement between Stonier and Wysocan was not solely to produce a seminar series but to launch a risk management consulting business.

Paper 119, ¶ 14. Digital states that, according to Stonier, at the same time Haskard suggested that Stonier could make a presentation about the proposed seminar series to the financial services sales force. Paper 116, ¶ 16. Stonier contends that Haskard agreed to stress the importance of the seminar series to Digital's sales force. Paper 119, ¶ 14. Stonier asserts that despite these assurances, Digital did not announce anything about the FDICIA program at the sales kick-off meeting. Paper 119, ¶ 14.

At DECworld – Digital's trade show – on May 7 or 8, 1992, Stonier executed a copy of Digital's standard Consulting Services Agreement ("CSA") with Wysocan. Paper 116, ¶ 17, 18. Originally, Wysocan wanted Stonier to execute the CSA on behalf of Omnimensions. Paper 116, ¶ 18. Because Stonier understood the CSA to require that Digital own anything the company did even if that work was not directly related to Digital, Stonier would not execute the CSA on behalf of Omnimensions but would on behalf of Thinkworks, Paper 116, ¶ 18.

May 20, 1992, Stonier submitted a work proposal to Wysocan which contained three separate project "modules." Paper 116, ¶ 19. Digital was free to accept the terms of any one or all of the modules. Paper 116, ¶ 19. Stonier argues that inherent in the work agreement was the goal of creating a risk management consulting business. Paper 119, ¶ 16. Stonier states that this understanding was in the general terms and conditions that were binding on all modules upon Digital's execution of the contract. Paper 119, ¶ 16. Digital states that on June 10, 1992, Wysocan accepted Module I, which committed

Thinkworks to develop six customer seminars and one Corporate Leaders Forum ("CLF") session. Paper 116, ¶ 21. The seminars, to be delivered beginning in July 1992, were to cost $15,000 each, and the total cost of Module 1 was to be $125,000. Paper 116, ¶ 22. Although Digital contends that it did not agree to Modules 2 or 3, Paper 116, ¶ 23, Stonier maintains that Wysocan also agreed to a revised version of Module 3, in which Thinkworks would train the Digital national financial services sales force about the opportunities FDICIA presented for the sale of Digital solutions to banks. Paper 119, ¶ 19. Stonier alleges a number of promises Digital made to her (including a promise to deliver computer technology to MIT and a promise to communicate information about the seminar series to its key customers) which Stonier maintains Digital broke. Paper 116, 28; Paper 119, ¶ 23.

On June 23, 1992, Thinkworks entered into a factoring agreement with Capital Funding Services. Paper 116, ¶ 32. The parties disagree as to the nature of this agreement. See Paper 116, ¶ 32, Paper 119, ¶¶ 26-27. Digital contends that the agreement assigned all of Thinkworks' rights in the accounts receivable due under the contract to Capital Funding. Paper 116, ¶ 32. Stonier asserts that Thinkworks only assigned its expense reimbursement receivable, a sum of $125,000, to Capital Funding. Paper 119, ¶¶ 26-27. Digital paid $100,000 to Thinkworks over the course of the contract. Paper 116, ¶ 34.

The seminar series was terminated in November 1992. Paper 116, ¶ 34. Digital claims that this was through mutual assent of Digital and Thinkworks.

Paper 116, ¶ 34. Digital says that Stonier claims that the series was terminated because of the failure of the Digital sales force to market the series. Paper 116, ¶ 34. Stonier claims that there was no mutual assent to cancel the series and that Digital left Thinkworks hanging when a December seminar was scheduled. Paper 119, ¶ 28.

In August 1993, Capital Funding sued Digital, alleging that Digital owed it $25,000 under the work agreement between Digital and Thinkworks. Paper 116, ¶ 35. The suit was eventually settled for $12,500. Paper 116, ¶ 35. In the settlement, Capital Funding released all claims against Digital, including claims for payment arising out of work performed by Thinkworks or arising under the invoices Thinkworks assigned to Capital Funding. Paper 116, ¶ 35. Stonier stressed that the settlement only concerned the specific receivable of $125,000. Paper 119, ¶ 29.

Digital states that there was never any contract between Digital and Omnimensions. Paper 116, ¶ 36. Stonier concedes that "[t]here was never a document physically signed by both parties," but maintains that there was an agreement between Digital and Omnimensions. Paper 119, ¶ 30. As proof of this alleged agreement, Stonier points to a document signed by Omnimensions *but not by Digital*. Paper 119, ¶ 30.

On February 12, 1996, Stonier, Thinkworks, and Omnimensions filed the instant suit in Vermont state court. Paper 1.[1] On March 11, 1996, Digital

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[1] Plaintiffs have been represented by no less than four different attorneys since the inception of this lawsuit. These were David Kelley (1996), Stephen Ellis (1996-97), Susan Buckholz (1997-98) and the firm of Van Dorn, Cullenberg & Tensen which entered its

removed the case to this Court asserting that the Court has jurisdiction based on diversity of the parties. Paper 1. The action asserts twelve counts: (1) breach of contract; (2) promissory estoppel; (3) misappropriation of trade secrets; (4) unjust enrichment; (5) interference with contractual relations; (6) interference with prospective advantage; (7) negligence; (8) fraudulent and/or negligent misrepresentation; (9) request for declaratory judgment; (10) wrongful discharge; (11) breach of covenant of good faith and fair dealing; and (12) unfair competition. Paper 69. On February 17, 1998, Digital filed the present motion for summary judgment. Paper 114.

DISCUSSION

I. Digital's Motion for Summary Judgment

A. Summary judgment standard

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material when it affects the outcome of the suit under governing law. Anderson

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appearance on August 25, 1998, after the court had taken the pending motions under advisement. Following M. Buckholz's withdrawal in June 1998, Ms. Stonier appeared pro se and attempted to appear for the corporate plaintiffs. Plaintiffs' constant replacement of counsel has contributed in no small measure to the delay in resolution of this lawsuit.

v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). There is a genuine dispute over a material fact when the evidence requires a fact finder to resolve the parties' differing versions of the truth at trial. Id. at 249 (citing First Nat'l Bank of Ariz. V. Cities Service Co., 391 U.S. 253, 288-89, rehearing denied, 393 U.S. 901 (1968)). "Uncertainty as to the true state of any material fact defeats the motion." Gibson v. American Broad. Co., 892 F.2d 1128, 1132 (2d Cir. 1989).

In analyzing the record, the court must view the evidence in the light most favorable to the nonmoving party and resolve all ambiguities in it favor. Dister v. Continental Group Inc., 859 F.2d 1108, 1114 (2d Cir. 1989). The moving party bears the initial burden of informing the court of the basis for the motion and of identifying those parts of the record which demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmovant may not rely on conclusory allegations or mere conjecture, but rather must offer specific facts to support a verdict in its favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986) (construing Fed. R. Civ. P. 56 (e)). As to any claim or essential element thereof for which the nonmoving party bears the burden of proof at trial, the nonmoving party must make a showing sufficient to establish the existence of that claim or element. Celotex, 477 U.S. at 322-25.

B. Application of the standard to the instant case

1. Count 1 - Breach of Contract

In its motion, Digital states that as Ms. Stonier and Omnimensions were not parties to the contract at issue, summary judgment should be granted for Digital on the breach of contract claims. Paper 114, ¶ 1. As Stonier notes, Paper 120 at 3, Stonier has asserted no contractual claims in this case. See Paper 69, ¶¶ 74-77.

Omnimensions asserts that there were two contracts at issue. Omnimensions claims that Digital and Omnimensions arrived at an agreement whereby "Digital promised to pay Omnimensions to develop and conduct a focus group event at the Massachusetts Institute of Technology's International Financial Services Research Institute on May 8, 1992." Paper 120 at 3. The only evidence that Omnimensions has presented that it contracted with Digital to develop the focus group event is a letter from Omnimensions inviting Digital to co-sponsor the focus group. Paper 120, Ex. 8. Although the focus group did take place, Omnimensions has not shown that i[t] was Omnimensions, rather Thinkworks, that sponsored the event. Indeed, in her deposition Stonier stated that the efforts being put into the May 8 event were solely for Digital. Paper 120, Ex. 7 at 49-50 (that part of project "being done only for [Digital]. Because if we were successful, the project by Digital's mandate was to be exclusive."). She further has made it clear that any work being done exclusively for Digital had to be done

through Thinkworks because Omnimensions was to be able to appeal to a broader client base. Paper 116, Ex. 10 at 73 (only Thinkworks, not Omnimensions, "is in the business of doing work exclusively for Digital"). Accordingly, because the May 8 event was developed solely for the benefit of Digital, Omnimensions could not have been a party to any contract regarding the event.

The second contract that Omnimensions identifies is the June 10, 1992 contract between Thinkworks and Digital which contained three Modules. Omnimensions contends that Digital made representations to Thinkworks, which then made representations to Omnimensions. Paper 120 at 5-6. Omnimensions notes that under Vermont law, "if the nature of a contract requires the involvement of third parties for its fulfillment, an agency relationship can be created. If the agent or promisor makes direct promises to the third party, the promisor has a duty to perform on such promises." Paper 120 at 5 (citing Bills v. Wardsboro School District, 150 Vt. 541 (1988); Young v. Lamson, 121 Vt. 474 (1960); Gerrish Corp. v. Universal Underwriters Ins. Co., 947 F.2d 1023 (2d Cir. 1991), cert. denied, 504 U.S. 973 (1991)). Under Omnimensions's theory, Thinkworks was acting as Digital's agent when it made representations to Omnimensions. Paper 120 at 6. Omnimensions therefore contends that it is a bona fide third party to the June 10, 1992 contract. Paper 120 at 6.

Omnimensions's use of agency law is novel but ultimately unavailing. In the first place, Omnimensions has not shown that the contract between Thinkworks and Digital required

Omnimensions as a third party. Omnimensions points to pages 5 and 9 of the contract between Digital and Thinkworks for the proposition that "It was written into the term of the Thinkworks contract that i[t]s performance required third party participants, and that it was Thinkworks' responsibility to find, hire, and manage third parties exclusively for the project." Paper 120 at 6 & n.12. Although those pages do mention other third parties, they do not contemplate the participation of Omnimensions personnel. Paper 120, Ex. 1 at 5 (noting participation of one M.I.T. professor, one "Big 6" accounting consultant, one major securities legal consultant, one Digital FABS consultant, and two Thinkworks consultants); Paper 120, Ex. 1 at 9 (reference to "Thinkworks consultants, the accountants and attorneys"). Even if Thinkworks could be considered an agent of Digital, its close relationship with Omnimensions would make it patently unfair to give it the power to bind Digital to Omnimensions.

Accordingly, I recommend that Count I be dismissed insofar as it relates to Omnimensions's ability to bring a suit.

Thinkworks also claims that Digital breached the contract by failing to fulfill its duties under Modules 2 and 3 of the contract. However, the record demonstrates that Digital accepted only Module 1 of the contract and fulfilled its contractual duties under Module 1.

Whether a contract is ambiguous is a question of law. Isbrandtsen v. North Branch Corp., 150 Vt. 575, 577 (1988). In this diversity action, the Court applies state law. Moller v. North Shore Univ. Hosp., 12 F.3d 13, 15 (2d Cir. 1993). Under both

Massachusetts and Vermont law, where a contract is plain on its face, a court is bound by the terms of the plain meaning. Ferris v. Marriott Family Restaurant, Inc., 878 F.Supp. 273, 275 (D. Mass 1994); Szczotka v. Snowridge, Inc., 869 F. Supp. 247, 250 (D. Vt. 1994). A writing is ambiguous where the contract language is inconsistent or its terms can reasonably be read to provide conflicting interpretations. Celtic Dev. Corp. v. FDIC, 836 F. Supp. 926, 937 (D. Mass. 1993); Judge Dev. Corp. v. Bank of New York, 814 F. Supp. 384, 388 (D. Vt. 1993). An ambiguous contract is usually construed against the drafter of the document. State v. Murray, 159 Vt. 198 (1992). Of course, the plain meaning of a contract is enforced when the contract language is clear and unambiguous. In re New England Tel. & Tel. Co., 159 Vt. 459 (1993).

Stonier on behalf of Thinkworks wrote the contract. A review of the contract reveals that its terms are clear and [un]ambiguous. Paper 120, Ex. 1. It contained proposals for three Modules. Thinkworks offered to undertake one or more Modules. The first Module called for Thinkworks to produce an FDICIA Seminar Program for fiscal year 1993 for a total contract price of $125,000. Stonier on behalf of Thinkworks and Wysocan on behalf of Digital accepted Module 1 in writing. Module 2 involved Risk Management Methodology Development and Training and was accepted by Thinkworks but not by Digital. Module 3 was for Sales Development and Training and was accepted by neither party. Modules 2 and3 mentioned revenue-sharing but Digital rejected both. Stonier admitted in her deposition that Digital had not

accepted Modules 2 and 3. Stonier Dep. II at 45, Paper 116, Ex. 11.

The language of Module 1 is clear. Thinkworks was to produce a seminar program for a sum of $125,000. Although Thinkworks produced only three of the promised six seminars, the program was terminated by mutual agreement. At this point Digital had paid Thinkworks the sum of $100,000. Thinkworks assigned its right to recover the remainder of the price to Capital Funding. Capital Funding sued Digital for the remaining $25,000. Digital and Capital settled the dispute, and Capital released Digital from any claims, including specifically claims for payment arising our of work performed by Thinkworks or arising under the invoices. Thinkworks assigned it contract rights [to] Capital Funding. Paper 114, Ex. 9. By assigning its rights under the contract to Capital Funding, Thinkworks relinquished its right to sue under the contract.

Accordingly, the motion for summary judgment on Count I should be granted.

2. Count 2 – Promissory Estoppel

As an alternative to their contract claim, Plaintiffs assert that Digital made certain promises regarding the FDICIA seminar series and revenue sharing which are enforceable under a theory of promissory estopple.

Promissory estoppel is an equitable doctrine designed to prevent injustice and unconscionable advantage where an exchange of promises did not

create a binding contract. Big G Corp. v. Henry, 148 Vt. 589, 594, 536 A.2d 559 (1987) (quoting Overlock v. Central Vermont Pub. Serv. Corp., 126 Vt. 549, 552-53, 137 A.2d 356 (1967)). Vermont law follows the Restatement Second formulation of the doctrine, Foote v. Simmonds Precision Products C., 158 Vt. 566, 573, 613 A.2d 1277 (1992), which provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Restatement (Second) of Contracts § 90 (1981). Promissory estoppel applies only where there is no agreement, where the promise is gratuitous, and there is unbargained-for-reliance. Chomicky v. Buttolph, 147 Vt. 128, 131 n.*, 513 A.2d 1174 (1986); see also Big G, 148 Vt. at 594. Likewise, under Massachusetts law, where a party asserts reliance on a prior oral representation which conflicts with a written contract, reliance on the oral representation is generally held to be unreasonable. Coll v. PB Diagnostic Syst., Inc., 50 F.3d 1115, 1124 (1st Cir. 1995).

In the instant case, there was a written contract to do Module 1 only. Digital did not agree to Modules 2 & 3. The promises Plaintiffs allegedly relied on were contrary to the provisions of Module 1. Moreover, in light of Stonier's admission that Digital did not agree to Modules 2 & 3, reliance on promises of revenue sharing, additional funding and a long-term relationship was unreasonable. Any expectations that Digital would agree to do the other Modules were based, at best, on mere hopes that if Module 1 were

successful, then Digital might consider additional funding. However, Wysocan told Stonier that despite his efforts Digital was unwilling to fund additional work.

There is no basis for the promissory estoppel claim.

3. Counts 3-6 & 12 – Misappropriation of Trade Secret, Unjust Enrichment, Interference with Contractual Relations, Interference with prospective Advantage and Unfair Competition

Plaintiffs claim that after the FDICIA seminar program was terminated, Digital constructed and ran its own seminar in competition with Thinkworks' FDICIA seminar series. This allegation is the basis for Counts 3-6 and 12 of the Complaint. Digital argues that there is no proof for this allegation and, alternatively, these claims are barred by the statute of limitations.

Plaintiffs allege that in November 1992 – shortly after the FDICIA seminar series was terminated – Digital conducted a Corporate Leaders Forum ("CLF") which competed with Plaintiffs' FDICIA series, targeted the same customers and used ideas derived from Thinkworks' seminar series. The record, however, fails to support this contention.

The agenda for Digital's CLF program, Paper 120, Ex. 9, bears no parallel to the agenda for the FDICIA seminar, Paper 120, Ex. 27, which was the subject of the contract. The CLF program fails to mention the FDICIA and an examination of the two

documents reveals no similarities. Moreover, it is undisputed that Digital had been regularly offering the CLF program since 1991 and much of the material had been taken from previous programs. See Paper 120, Ex. 20, Behrens Dep. at 8-9, 14-16, 17-19, 43. The mere fact that the programs may have been targeted to the same audiences is not sufficient to show that the CLF program was a "knock-off" of the FDICIA program. Accordingly, Plaintiffs have failed to present any evidence to support Counts 3-6 and 12 of their Complaint. There is no need to reach Digital's statute of limitations argument.

4. Counts 7-8 – Negligence and Fraudulent and/or Negligent Misrepresentation

Plaintiffs claim that the alleged promises made to them in connection with the FDICIA seminar series constituted fraudulent or negligent misrepresentation. However, the allegations of Digital's promises are essentially the same as contained in the breach of contract claim. The claims of negligence are torts. It is not a tort to breach a contract. Redgrave v. Boston Symphony Orchestra, Inc., 557 F. Supp. 230, 238 (D. Mass. 1983); see also Breslauer v. Fayston School District, 163 Vt. 416, 422, 659 A.2d 1129, 1133 (1995). Accordingly, these claims are no more than claims for breach of contract which I have previously found to be without merit. These tort claims also must fail.

5. Counts 9 and 10 - Declaratory Judgment and Wrongful Discharge

Alleging fraud, Stonier seeks to have the T[FS]A declared void and unenforceable. Paper 69, ¶¶ 121-25. Additionally, Stonier has filed a claim of wrongful discharge based on Digital's allegedly fraudulent behavior in terminating her employment. The TFSA released Digital from any claims Stonier could make against Digital. Digital's brief focuses mainly on the issue of whether the TFSA is valid. See Paper 115 at 9 ("The question of whether [Stonier] can nonetheless sue Digital on a wrongful discharge claim therefore turns on the validity of the TFSA."). Digital argues that because Stonier kept the benefits of the TFSA, she cannot now claim that it was invalid. Paper 115 at 9. Digital points to Deren v. Digital Equip. Corp., 61 F.3d 1 (1st Cir. 1995) for support. In Deren, the plaintiffs alleged that they signed releases waiving all claims against Digital under duress. Id. at 1. The court held that by waiting three and one half years to bring suit, the plaintiffs ratified the releases and thus waived their claims. Id. The court noted that a contract that is induced by duress is voidable, not void, and an individual claiming duress must act promptly to repudiate such a contract. Id. at 2; see also Pekin v. Digital Equip. Corp. No. 95-11103-PBS, slip op. (D.Mass.Dec. 20, 1995). As Stonier notes, she is not claiming that her decision was coerced; rather, she alleges that it was induced by fraud. Paper 120 at 7. Accordingly, Deren and like cases are inapposite. There a plaintiff attempts to avoid a waiver of claims based

on duress, the plaintiff knew of the duress when it occurred. Where the avoidance is based on fraud, the plaintiff does not know about it until after the fact.

Digital also argues that the TFSA is "clearly valid." Paper 115 at 10. By its terms it still is, but if Stonier was fraudulently induced to sign the agreement, the agreement is not valid. Stonier asserts that she has presented evidence to prove that the entire process by which she was laid off was fraudulent. Paper 120 at 8.

As for Digital's assertion that Stonier must return the benefits before she can proceed with her claim, the case of Soliman v. Digital Equip. Corp., 869 F. Supp. 65 (D. Mass. 1994) is instructive. In Soliman, a Digital employee signed a TFSO ("Transition Financial Support Option") that purported to release Digital from any age discrimination claims that Soliman might have. Id. at 66. The waiver did not comply with the Older Worker Benefit Protection Act. Id. at 67. Accordingly, the court ruled that although both Digital and Soliman were under the mistaken impression that the waiver was valid, the waiver was void. Id. 69. The court noted that "where a party seeks to avoid a contract induced by fraud or duress, or based on mutual mistake, if he had received anything of value under the agreement, he must return it or tender it back." Id. at 69 (quoting Simpson and Alperin, 14 Mass. Practice., § 325). The court noted that requiring Soliman to return benefits he received would chill his prospects of prosecuting his claim. Id. at 70. Accordingly, the court ruled that should Soliman prevail, Digital was entitled to set-off of the benefits. Id.

So this is where the issue lies: if Stonier was fraudulently induced to sign the TFSA, she can maintain her action. If not, she has no claim. Examining all the so-called "evidence" that Stonier points to, I fail to see any evidence of fraudulent inducement. The evidence demonstrates only an attempt to find funding for her project and an inability to do so. Stonier must do more than just allege that there was attempt to defraud her, and she has failed to produce any evidence to that effect. Stonier alleges that there was fraudulent inducement because Digital represented to her that there was no interest from Digital's business units to fund her knowledge systems business as an employee, that her regular job out of New York City had been eliminated and she was scheduled for a May 1991 layoff. Paper 119, ¶ 2. Stonier points to a number of exhibits to support her contention. Nevertheless, this Court's review of the documents, and reading those documents in Stonier's favor, leads to the conclusion that there was no fraud involved. Among the exhibits is an October 30 memo from Diana Watts that states that she wanted to consider Stonier's proposal but was "concerned about the time frame [and] any legal implications etc." Paper 120, Ex. 31. Exhibit 32 is a December 11, 1991 memo from Watts to Stonier stating that the Channels Business Unit did not want to develop Stonier's proposal because the return on investment would not be sufficient and because the work contemplated did not tie into the Channels New Venture Charter. Paper 120, Ex. 32. Exhibit 33 is a November 21, 1991 memo from Ron Smart in which Smart stated that unless Jay Atlas's group was willing to fund Stonier's proposal,

her name would have to be submitted to the committee. Paper 120, Ex. 33. The memo goes on to state that Stonier had been scheduled for downsizing but been brought to Maynard, MA to develop her proposal. Paper 120, Ex. 33. The memo states that at that point, Stonier had not been able to reach agreement with a business unit manager on her proposal. Paper 120, Ex. 33. The memo also states that although the Atlas group had been interested in the proposal, that interest had waned. Paper 120, Ex. 33. The memo concluded that "[o]ur conclusion is that the possibility of [Stonier] being able to get acceptance of her business plan in any reasonable time frame is so small that we should submit her to the downsizing program this week." Paper 120, Ex. 33. Finally, the memo noted that although the proposal was relevant to Digital, there was no business unit prepared to fund the venture at that time. Paper 120, Ex. 33. Exhibit 34 is a December 17, 1991 memo from Christine Duvivier to Stonier in which Duvivier expressed interest in working with Stonier "one way or another." Paper 120, Ex. 34.

After exhaustive discovery, Stonier's claims of fraud are based on conjecture and speculation. More is required to successfully oppose a motion for summary judgment. Accordingly, I recommend that the Court grant Digital's motion in regards to the Counts 9 and 10.

6. Count 11 – Breach of Covenant of Good Faith and Fair Dealing

There is an implied covenant of good faith and fair dealing in every contract. This covenant imposes a duty on each party to the contract "[not to] do anything to injure or destroy the rights of the other party to receive the benefits of the agreement." Shaw v. E.I. DuPont De Nemours and Co., 126 Vt. 206, 209, 226 A. 903, 906 (1967) (citations omitted). The implied covenant of good faith and fair dealing necessarily requires a contract. Without contract, there can be no covenant of good faith and fair dealing. McHugh v. Univ. of Vermont, 758 F.Supp. 945, 953 (D. Vt. 1991), aff'd, 966 F.2d 67 (2d cir. 1992); see also FDIC v. LeBlanc, 85 F.3d 815, 833 (1st Cir. 1996) (Massachusetts law). As noted supra, Stonier and Omnimensions did not have a contract with Digital. Accordingly, their claim for breach of this covenant must fail. As for Thinkworks, which did have a contract with Digital, the record demonstrates that Digital did not breach its contract to pay Thinkworks for performance of Module 1. Since Thinkworks has failed to demonstrate a breach of contract, it cannot show that Digital breached the implied covenant of good faith and fair dealing. Thinkworks received all the benefits promised under the terms of the contract. Furthermore, Thinkworks assigned its contract claims to Capital Funding which released these claims when it settled with Digital. These claims should be dismissed.

In summary, the gist of this case is that Stonier claims she was misled into believing that there was no real desire on the part of any of Digital's departments

to develop her business ideas at the time she was to be terminated. As a result, Stonier signed an employment release so that she could not bring any claims against Digital. The evidence indicates that certain individuals at Digital did try to drum up support for Stonier's business proposals but were unsuccessful in doing so; there is simply nothing in the record to indicate any effort on Digital's part to mislead Stonier into signing the release.

Stonier then proposed three different "modules," which were business arrangements. Digital signed on to do the first module. Stonier maintains that there was more to the arrangement than the contract reflects. She asserts that Digital was under an obligation to help her develop a "business." However, the contract states that Digital would pay for the seminar series and that is all. Digital has fulfilled this obligation by settling the dispute with the assignee of Stonier's rights, Capital Funding. Stonier's claims that there was more to the contract than what appears on the written contract cannot survive a motion for summary judgment.

II. Digital's Motion for Expenses (Paper 107)

Digital seeks its costs and expenses arising from Plaintiffs' substitution of expert Bancroft for expert Jarosz. Digital claims that it is entitled to its expenses related to preparation for Bancoft's testimony, which Digital claims is now worthless. Digital seeks these expenses as a condition of Plaintiffs' use of Bancroft at trial.

As I have recommended that the case be dismissed, Digital's motion is DENIED as moot.

CONCLUSION

I recommend that Digital's motion for summary judgment (paper 114) be GRANTED. I DENY Digital's motion for expenses (Paper 107).

Dated at Burlington, in the District of Vermont, this 22 day of September, 1998.

s/Jerome J. Niedermeier
United States District Court

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appellate review of the district court's order. See Local Rule, 72.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a) and 6(e).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 98-9648

PAMELA STONIER,
THINKWORKS, INC. AND
OMNIMENSIONS, INC.,

Plaintiffs-Appellants,

v.

DIGITAL EQUIPMENT CORPORATION

Defendant-Appellee.

Appeal from the United States District Court
For the District of Vermont
Docket No. 2:96-CV-90

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE, NEW YORK 10007

KAREN GREVE MILTON, ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New

York, on the 10th day of December one thousand nine hundred and ninety-nine.

Stonier, [et al.] Appellant[s]

v

Dkt No: 98-9648

[Filed Dec 10, 1999]

Digital Equipment C Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Pamela Stonier, Thinkworks, Inc. and Omnimensions, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Hon. John M. Walker, Jr.,
Hon. Pierre N. Leval,
Hon. Rosemary S. Pooler,
Circuit Judges.

FOR THE COURT, KAREN GREVE MILTON, Acting Clerk - By: s/Beth J. Meador, Administrative Attorney